IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 220 of 1989

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

KALYAN S GANDHVI

Appearance:

1. Criminal Appeal No. 220 of 1989

Ms.Hansa Punani, learned A.P.P. for Appellant

MR YS MANKAD for Respondent No. 1

MR BY MANKAD for Respondent No. 1

NOTICE SERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 21/06/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

#. The State has filed the present appeal under Section 378 of the Criminal Procedure Code against the order of acquittal passed by the learned Sessions Judge, Kutch, Bhuj in Sessions Case no. 56 of 1988 on 19.01.1989 wherein the respondent-original accused was facing the charge under Sections 17 & 18 of the Narcotic Drugs and Psychotropic Substances Act,1985 (NDPS Act for short) wherein, at the end of the trial, he was acquitted by the learned Sessions Judge which gives rise to the present appeal.

#. The brief facts of the present case are as under :

On 01.06.1988, P.S.I. R.J.Aasrani of Mundra Police Station, Kutch District was on patrolling along with Police Constables Kalpeshbhai, Vinodbhai etc. and when they reached Bhadreshwar village at about 17.00 p.m. Police Constable Kalpeshbhai, who has received information from his informant, informed P.S.I. Aasrani to the effect that one Kalyan Sava Gadhvi, resident of Vavar village is having contraband articles of narcotic substance in his possession and he is selling the same. On receiving the above referred information, Mr.Aasrani called the panchas and prepared the primary panchanama there and thereafter he along with the Police Personnel and two panchas went to village Vavar wherein he inquired regarding the residence of Kalyan Sava Gadhvi and when they reached at the residence, the door was closed, he knocked at the door and in response, Kalyan Sava Gadhvi opened the door. P.S.I. Aasrani and other including panchas entered into the premises which consisted of two rooms and repairing work was going on. Thereafter, they searched the accused and nothing has been found from him and thereafter they seized one plastic bag which was about one kg. in weight and on opening the same contraband narcotic substance opium was found and from that some substance has been taken out for the purpose of analysing the same and thereafter, after completing all the formalities like sealing etc., panchanama to that effect has been prepared there and there and it has been signed by panchas and P.S.I. Shri Ansari and muddammal was seized. Thereafter, Ansari prepared the complaint and signed the same and thereafter they went to the police station along with the complaint, panchanama, muddammal and accused and complaint to that effect was filed with the Mundra Police Station which was registered

as Mundra Prohi.C.R.No.31 of 1988 under Sections 17 & 18 of the N.D.P.S.Act. Thereafter, further investigation started and muddammal was sent to F.S.L. and after receiving the opinion of the F.S.L. expert, chargesheet was submitted in the Court of learned Sessions Judge, Kutch-Bhuj.

#. The learned Sessions Judge framed the charge at exh.1 on 2.11.1988 against the respondent-accused for the offences punishable under Sections 17 & 18 of the N.D.P.S.Act. The charge was read over and explained to the respondent-accused who pleaded not guilty and claimed to be tried. Therefore, the prosecution examined in all five witnesses i.e. (1) P.W.No.1 Karsan Vishram Exh.5, (2) P.W.No.2 Vinod Vishanji Chaudhari Exh.7, (3) P.W.No.3 Kalpesh Virjibhai Patel Exh.8, (4) P.W.4 Chanubha Pujubha Exh.11, (5) P.W.5 Rameshchandra Jamnadas Aasrani Exh.12. The prosecution also produced documentary evidence viz. panchanama Exh.6, Complaint Exh.13, Receipt from F.S.L. Exh.16, F.S.L.report Exh.17 etc. On submission of the closing pursis by the prosecution, the learned Sessions Judge recorded further statement of the accused under Section 313 of the Criminal Procedure Code. Thereafter, after hearing the learned counsel for the respective parties, the learned Sessions Judge acquitted the accused against which this appeal is preferred by the State.

#. We have heard the learned A.P.P.Ms.Punani for the State and Mr.B.Y.Mankad for Mr.Y.S.Mankad learned counsel for the respondent-accused.

#. Ms.Punani learned A.P.P. has taken us through the oral as well as the documentary evidence on record along with the reasoned judgment delivered by the learned Sessions Judge and argued that it has been proved beyond reasonable doubt that the muddammal in question has been recovered from the house of the accused and therefore the Court below ought to have accepted the same. It has been further argued that the muddammal in question is a contraband article opium as per the opinion of the F.S.L. expert and therefore once it has been proved that the muddammal in question is recovered from the house of the accused and it is a contraband article, then prosecution is entitled for the benefit of Section 35 and 54 of the N.D.P.S.Act and there is no rebutal evidence on record. Therefore, the Court below ought to have convicted the accused for the crime in question.

#. Mr.Mankad on the other hand, has taken us through the judgment in question, more particularly para 23, wherein the Court below has summarized the findings after

discussing the oral as well as the documentary evidence and also after considering the arguments advanced by the learned counsel for the parties and argued that the complainant P.S.I.Aasrani who has received the said information from his Constable has neither reduced the same in writing nor has informed the same to his superior officer within the stipulated time. It has also been argued that the muddammal in question was not weighed by them and before search also they have not informed the accused about the rights for search and seizure in the presence of Magistrate of Gazetted Officer. It is further argued that the prosecution has not proved the ownership of the property in question from where the muddammal was alleged to have been found and also failed to prove that the muddammal in question has reached the F.S.L.intact. He has also drawn our attention towards the oral evidence of the complainant wherein he has admitted that he has not handed over the muddammal to any body and it was with him till 7.6.1988 and further admitted in cross-examination that he does not know what happened to the muddammal thereafter. In short, it is the submission of the learned advocate for the respondent that there is no evidence that the muddammal seized from the above referred place reached the F.S.L. and same has been analysed by them.

#. It is established from the oral as well as documentary evidence on record that the complainant P.S.I. Aasrani who had received the information through his Constable had neither reduced the same in writing nor he has informed his superior officer within the stipulated time and also that they have not followed the required provisions regarding the valuable rights of accused for search and seizure before the Gazetted Officer/Magistrate. It is also established that while doing search and seizure, no required procedure has been followed by the prosecution which reflects from the evidence of P.W.3 Kalpesh Virjibhai Patel exh.8 and P.W.5 Rameshchandra Jamnadas Aasrani exh.12. It reflects from the evidence of P.S.I.Aasrani that he received information through Police Constable Kalpeshbhai that the present accused is keeping narcotic substance (opium) in his custody and is selling the same but he has fairly admitted that he has not reduced in writing the same and he has also not informed his superior officer regarding the same. It is also established from the evidence and other documentary evidence that before doing the search and seizure, no required formalities are followed by the prosecution. Even muddammal has not been weighed. Complainant P.S.I. Shri Asrani has fairly admitted in his cross-examination that he has kept muddammal with him

but is not remembering that when and with whom he has sent the same to the F.S.L. It has also been admitted by him that he does not know what happened to the muddammal. Even the prosecution has not tried to lead the evidence to that effect that the muddammal in question has been seized and same has been sent to the F.S.L. and same has been analysed by them and till then it has remained in safe custody and there were no possibilities to tamper with the same. Even no arrest memo has been prepared and accused were not informed regarding his arrest and even superior officer were not informed within the stipulated time after the search and seizure. In short, from the stage of receiving the information till the end of investigation, no procedure as required has been followed and therefore the court, on considering the same in detail, rightly acquitted the accused and therefore this appeal is dismissed.

#. Accordingly, this appeal is dismissed. The judgment and order dated 19.01.1989 delivered by the learned Sessions Judge, Kutch-Bhuj in Sessions Case No.56 of 1988 is hereby confirmed.

(R.P.DHOLAKIA, J)

(SHARAD D DAVE, J)

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